Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1994

RENE M. PION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF ISSUES PRESENTED

1) Whether a Hispanic Criminal defendant, tried and convicted by a jury venire including a 3.4% absolute disparity between the 4.2% Hispanic representation in the relevant general population and the 0.80% Hispanic representation in the Jury Wheel resulting in an 80.95% relative underrepresentation, constitutes a statistically significant and Constitutionally cognizable underrepresentation, therefore violative of the Fifth and Sixth Amendments to the United States Constitution consistent with the reasoning of Judge Toruella's concurring opinion below?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rene Pion respectfully prays that a writ of certiorari issue to review the decision and order of the First Circuit Court of Appeals entered on June 1, 1994.

OPINION OF THE FIRST CIRCUIT BELOW

The opinion of the First Circuit is reprinted in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment VI:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner seeks certiorari to address the critically important questions of constitutional law arising out of the selection of an impartial jury. The Petitioner's jury was not drawn from a representative cross-section of his community.

On August 1, 1991, the Federal Grand Jury sitting for the District of Massachusetts returned a three count indictment against Appellant Pion. Count one charged Pion and three co-defendants, Christobalina Tejada, Freddie Querubin and Freddie Catano, with conspiracy to distribute cocaine. Count two charged Pion and others with distribution of cocaine on June 4, 1991. Count three charged Pion, Tejada, Querubin and Catano with cocaine distribution on July 3, 1991.

On June 15, 1992, Tejada, Querubin and Catano pled guilty to counts one and three. Pion pled not guilty, and went to trial commencing on June 17, 1992. On July 2, 1992 the jury returned guilty verdicts against Pion on all three counts.

Thereafter, Pion timely filed a motion for a new trial. Subsequently, Pion filed memoranda of law supporting his motions, and the Government subsequently responded thereto. On or about January 14, 1993, the Trial Court, the Honorable William G. Young, presiding, heard oral argument on the post trial motions by Pion, which were denied by the District Court.

A pre-sentence report was prepared by United States Probation Officer Miriam Arroyo on or about December 3, 1992, and it was disclosed to the defendant. On or

about December 9, 1992, Appellant Pion filed his position with respect to the Pre-sentence Investigation Report. The District Court found that the alleged conspiracy involved six thousand five hundred and two point four grams (6,502.4) of cocaine and that under 28 U.S.C. 841(b)(1)(A), this alleged quantity purportedly required a ten year mandatory minimum sentence. Consequently the trial court imposed a ten year sentence for each of the counts, to run concurrently.

The First Circuit issued its decision on June 1, 1994. Petitioner hereby timely submits this petition for a writ of certiorari.

STATEMENT OF FACTS

Appellant Pion was tried before a jury drawn from the 1992 Master Jury Wheel, U.S. District Court for the District of Massachusetts, Eastern Division, Boston, MA. The break-down of ethnic participation and the percentage representation of that community in the community at large in the Federal District, indicates the following:

Hispanics comprise 4.20% of the population of the District of Massachusetts, but only 0.80% of the Master Jury Wheel employed by the United States District Court. Whites comprise 91.18% of the population and 94.23% of the Jury Wheel. Blacks comprise 4.43% of the population and 3.35% of the Jury Wheel. Asians comprise 2.19% of the population; 1.00% of the Jury Wheel. American Indians represent 0.19% of the population; 0.27% of the Jury Wheel.

Hispanics are the only population group so substantially underrepresented in the Jury Wheel. The underrepresention of Hispanics results in a 3.4% absolute disparity, relative to the population size and actual participation in the Jury Wheel. This results in 80.95% relative underrepresentation of Hispanics in the Jury Wheel (the number which should be called relative to the number actually called, consistent with the number of Hispanics in the population).

At trial, the Government presented alleged proof of the following: The Government's evidence essentially involved testimony from various surveillance agents of the Drug Enforcement Administration, and the testimony of Steven Mendoza. Mendoza was a hired cooperating individual who was paid over fourteen thousand ($14,000) dollars for his services in posing as a liquor distributor calling at Appellant Pion's restaurant. The crux of this case involves the Government's conduct, in utilizing its agent, Steven Mendoza, to solicit and setup Appellant Pion to engage in a narcotics conspiracy.

When Appellant Pion was initially introduced to Steven Mendoza, the confidential informant, in the Spring of 1991, Rene Pion was the manager of a Dominican Restaurant, Rincon Criollo (hereinafter referred to as "the restaurant") in Lynn, Massachusetts. Especially popular amongst the patrons of Pion's restaurant is a specialty Caribbean beer, "El Presidente" which is often in short supply and available only at premium prices through ordinary business channels.

Here, the Government's agent, Steven Mendoza took advantage of Pion's legitimate commercial need and

began to manipulate him through the agent's pose as a liquor distributor. Mendoza began to furnish Pion, supplying him with substantial quantities of "El Presidente" beer, in quantities, prices and even with credit terms unavailable through any other supplier available to Mr. Pion. Consequently, Pion came to regard Mendoza as an essential business relationship; the excellent quantities of his specialized beer at sub-market prices served as an essential and substantial facilitator of business profit for Mr. Pion. (See Pion testimony).

Through a series of weeks and through a variety of conversations, Mendoza continuously urged Pion to connect him with "Colombians" that could supply him with drugs. Initially, Pion resisted the pressure tactics by Mendoza, but was led to feel that his extremely beneficial relationship with Mendoza was contingent upon his making a connection for Mendoza which would lead to a source of cocaine.

A number of these conversations between Pion and Mendoza were recorded, however many of those tapes were poorly translated or edited and contain numerous inaudible portions which render them of only limited utility. Nevertheless, a pattern emerges from the tapes. Pion consistently attempted to discuss beer with Mendoza; Mendoza consistently led the conversations into his interest in purchasing cocaine. These conversations consistently illustrated the disparate interests of the two individuals involved. Pion never sought to profit from any drug transaction, except to keep the flow of beer available to his restaurant.

Mr. Pion was apparently an honest businessman operating in the context of a Latino male cultural milieu, in which it is considered honorable and obligatory for a person to return favors to those from whom one has received such considerations. It is undoubtedly true that there were individuals who readily had access to drugs in that same milieu. Mr. Pion knew some of them, just as anyone else who lived and ran a business in that community might know who they are. Significantly for Pion, however, is the fact that prior to his relationship with Mendoza, with all Of the coercion and sense of obligation which that relationship engendered, Pion had never before participated in any drug trade, either as a buyer or a seller. He had lived and worked in this country for over ten years building a business and supporting his family, with no more serious legal infraction than a traffic ticket. Absent Mendoza's creation of the condition precedent to Pion's participation, there was no evidence to suggest that he would have ever individually elected to engage in the conduct for which he was accused.

The critical testimony in the trial of this case came from the Government Agent, Mendoza, who was hired with substantial sums of monies to solicit and facilitate a drug transaction. Mendoza's testimony began on June 25, 1992, on page 83 of the transcript of that date. Mendoza testified that he was posing as a beer dealer (transcript at 87) and that he went to the Rincon Criollo restaurant in Lynn, which was managed by Mr. Pion. (transcript at 88) Mendoza testified about his deliveries of huge quantities of beer, including some two hundred and fifty cases (250) of beer which were delivered on or about May 22, 1991. (See transcript at 88-89) Ultimately, when Mendoza

pressed Pion for a source of cocaine, Pion only indicated that he had a friend (transcript at 91) but consistently denied any personal interest. Ultimately, Pion introduced Mendoza to an individual, Rafael. Subsequently, Rafael informed Mendoza that the purchase price for half a kilo of cocaine would be eleven thousand five hundred ($11,500.00) dollars. On June 4, 1991, Mendoza traveled to the restaurant along with DEA Agent Norma Ayala, who was posing as Mendoza's niece. Rafael arrived, and requested an opportunity to see the purchase money. The cocaine purchase was ultimately made. According to the laboratory report, the contents of cocaine had a net weight of 497.4 grams.

After this transaction, through numerous telephone calls and visits Mendoza continued to pressure Pion for additional connections. On July 3, 1991, Mendoza traveled to the restaurant and met Pion. During this meeting, Mendoza again indicated that he desired to purchase six kilograms of cocaine in one transaction. Pion ultimately went to the location, known as Building 19 in Lynn. After arriving, Pion met with Mendoza and subsequently introduced Mendoza to Chrystobelina Tejada. Ms. Tejada was the source of arranging the cocaine delivery. The money for the purchase of the cocaine was displayed to Tejada, and subsequently Pion and Tejada left the area in Pion's car. Subsequently, Querubin arrived and Tejada advised Mendoza that the kilogram of cocaine had arrived. Subsequently, Catano arrived. Mendoza and Tejada then met and were joined a few minutes later by Pion, at which time Tejada informed Pion and Mendoza that the cocaine would bedelivered at the Registry of Motor Vehicles, at another location. Tejada, Pion and Mendoza then left the

parking lot in separate vehicles. Mendoza then proceeded to the parking area at the Registry of Motor Vehicles. At the Registry, Mendoza met with Tejada, Querubin and Catano appeared. Pion did not go. Mendoza then left the area to meet with the supervising surveillance agents.

As instructed by Special Agent Burch, Mendoza then telephoned Pion, who was back at his restaurant. Mendoza then instructed Pion to contact Tejada. Mendoza instructed Pion to tell Tejada to return to the Building 19 parking lot to consummate the transaction. Mendoza, Querubin and Catano, along with Tejada arrived at the Building 19 parking lot. Pion was not present. Tejada, Querubin and Catano were placed under arrest. Moments before her arrest and without the knowledge of Pion, Tejada was asked if she could supply three more kilograms in the future. Her positive response is the sole basis for charging Pion with conspiracy to distribute the six kilogram quantity. Pion was arrested later at his restaurant, the Rincon Criollo.

According to the laboratory report the three kilogram sized packages seized from the trunk of Tejada's vehicle contained cocaine of the net weight of 3,005 grams.

The testimony and admissions elicited on cross-examination from Mendoza demonstrate entrapment. Mendoza indicated that on May 30, he said to Pion that he knew that Pion was not in the business of drugs. (transcript at 129) Moreover, on May 30, Pion stated to Mendoza some three or four times that Pion does not deal with drugs. (Mendoza testimony, transcript)

Mendoza's testimony further illustrated discriminatory bias against Dominicans. Mendoza stated, "I do not

like them." (transcript of June 26-testimony at pages 7 & 8) Mendoza again admitted that on some three or four occasions that Pion told him that he did not deal in drugs. (transcript at 10-11 from June 26) Mendoza further testified that Tejada had told him that Pion did not deal in drugs. (June 29, trial transcript Page 51).

THE DEFENSE EVIDENCE

Rene Pion who testified in his own defense and explained the elaborate scheme and pattern of pressure and coercion that Mendoza placed on him, arising out of an apparently legitimate commercial relationship involving the distribution of beer. (See transcript); Pion's testimony began on June 29, 1992. (page 120 of transcript) After Mendoza made contact with Pion to begin the process of solicitation Mendoza explained that "I'm going to get you all the Presidente that you want. At $16.00 a case. It cost $26.00." (transcript of June 30 at 14) Pion explained that he was happy because Mendoza was going to bring him the beer. The transcript of June 30, at pages 14, 15, 16 and 34 indicate the most severe and pervasive pressure placed upon Pion which included various inducements. Mendoza explained that if Pion would get him someone that would be a source of drugs that he could get the beer for him even cheaper. Rene Pion was induced, pressured – and entrapped by Government agents.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS SUBSTANTIAL FEDERAL QUESTIONS WORTHY OF THIS COURT'S ATTENTION AND BECAUSE OF CONFLICTING DECISIONS OF CIRCUIT COURTS THAT HAVE ADDRESSED THE ISSUE.

Petitioner submits that the concurring opinion of Judge Torruella represents particularly noteworthy insight into these troublesome constitutional issues. The pertinent part of Judge Torruella's concurrence appears as follows:

> As is well known, to establish a prima facie violation of the cross-section requirement, a petitioner must show: (1) that the group alleged to be excluded is a "cognizable" or "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation in petitioner's venire is due to the systematic exclusion of the group in the jury-selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979); 439 U.S. 357, 364 (1979); *Hernandez v. Texas*, 347 U.S. 475, 579 (1954).
>
> There should be little doubt regarding the cognizability of Hispanics for Sixth Amendment purposes. See *Hernandez v. Texas*, 347 U.S. at 475; *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1986). Where I part company with my colleagues is in our relative application of the second and third Duren prongs.

In my view, in contrast with the majority, the figures presented by appellant show a statistically significant underrepresentation of Hispanics within the jury venire. According to the 1990 census, 4.2% of the residents within the Eastern Division of the District of Massachusetts, the relevant community, are Hispanics. Yet Hispanics represent only .80% of the venires for that Division. Otherwise stated, although the population composition is such that one would expect 42 Hispanics to serve on the district court's jury for every one-thousand citizens called to such duty, in fact only eight Hispanics serve in the venires for every one-thousand citizens called. Appellant further contends that when compared with other identifiable ethnic groups, such as non-minority whites, blacks or American Indians, only Hispanics are disproportionately underrepresented – and the statistics were produced to support this contention.

According to my calculations, if one takes the above figures as correct, Hispanics are underrepresented in the venire by 80.95% as compared to their numbers in the community. *Duren v. Missouri*, supra, at 364. Such a disparity is not only statistically significant but also constitutionally cognizable. Id. My method of determining disparity is dubbed the "comparative disparity: standard by my colleagues, ante at 8 n.5, which they understand should not be used "where [the] allegedly underrepresented group constitutes [a] very small proportion of the total population." Id. Citing *United States v. Hafen*, 726 F.2d. 21, 23-24 (1st Cir. 1984), they promote the so-called "absolute disparity" standard, ante at 9 nn. 5-6, whereby they conclude that the underrepresentation is only 3.4%, a spread

which is said to be constitutionally insignificant. Hafen tells us that this system of calculating disparity should be used where the cognizable group is small because if the "comparative disparity" method is used under those circumstances, it will distort "reality." *Hafen*, 726 F.2d at 24.

I believe this to be an erroneous conclusion for several reasons. First of all, I find *Hafen* to run contrary to prior, valid circuit precedent in *LaRoche v. Perrin*, 718 F.2d 500 (1st Cir. 1983), which established the so-called comparative disparity calculation as the circuit standard for determining underrepresentation. See also *Barber v. Ponte*, 772 F.2d 982, 989 n.n.11, 12 (1st Cir.1985). *Hafen's* attempt to distinguish *LaRoche* is unconvincing. Secondly, the majority's approach leaves us without any guide or standard as to when the cognizable group is to be considered too small or large so as to trigger the switch from one standard to the other. It would appear that applying different constitutional standards to varied groups, depending on whether they are large or small, would not only raise substantial equal protection issues, but would defeat the important goals promoted by the Jury Selection and Service Act and the Sixth Amendment. The minorities most in need of protection are those least entitled to it, to allegedly prevent a "distortion of reality." I might ask who's "reality" is the failure of a criminal law system, before which is tried a large number of persons from an ethnic group, to include within its mechanisms the peers of those charged, at least in some reasonable measured proportion to their membership in the population. Finally, on its face the so-called

"absolute disparity" standard appears to run contrary to *Duren*, which speaks to "the representation of [the] group in the community . . . in relation [i.e., in comparison] to the number of such persons in the community." *Duren, supra*, at 364. This language seems to speak in comparative, not in absolute, terms.

We thus come to the issue of systematic exclusion. Normally, systematic exclusion requires a showing of substantial disparity in numbers over a sustained period of time, *Barber v. Ponte*, 772 F.2d 982, 989 (1st Cir. 1985), something which has not been established by appellant in this case. I believe, however, that where the disparity established by the claimant reaches the proportion of those in the present case, 80.95%, the burden must be shifted to require the government to justify that such an aberration is not the product of inappropriate conduct. In most cases, such as perhaps the present one, this should be a burden easily explainable by the government.

Had appellant complied with the absolute requirements of 28 U.S.C. sec. 1867, I would have voted for reversal of his conviction, although as indicated above, I believe that at least part of the majority's reasoning is flawed.

THE DEFENDANT WAS DENIED HIS RIGHT TO AN IMPARTIAL JURY AND TO DUE PROCESS OF LAW AS THE JURY WAS NOT DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY.

The Defendant is entitled to be tried before an impartial jury drawn from a representative cross-section of the

community. Those rights are guaranteed by the Fifth and Sixth Amendments and to the United States Constitution and have been validated in a series of cases. See *United States v. Hafen*, 726 F.2d 21 (1st Cir. 1984), cert. den., 466 U.S. 962; see *Peters v. Kiff*, 407 U.S. 493 (1972); *Duren v. Missouri*, 439 U.S. 357 (1979).

Statistics obtained from the United States District Court Clerk's Office for the Eastern Division suggest that Hispanic minority members are so grossly underrepresented among federal juries, as to constitute a"systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. at 364.

The analysis of the 1992 Jury Wheel suggests that 4.20% of the residents of Massachusetts are Hispanic [this information is attributed to the 1990 census, from which other data, previously obtained, indicated that figure at 4.80%; see Addendum. Counsel accepts, *arguendo* the lower percentage employed by the Clerk's Office for purposes of this argument.] Jury Wheel Statistics indicate that Hispanics comprise only 0.99% of those individuals completing and returning the jury questionnaires and 0.80% of jurors present for orientation in Boston. [Addendum] This means that Hispanics are so grossly underrepresented as to be substantially below all other known minority groups in the Commonwealth, for purposes of jury availability and selection. This phenomenon has been occurring while at the same time, by all accounts, the Hispanic population of Massachusetts is the most rapidly growing minority group. The denial of participation in the jury process by Hispanics thus represents the disenfranchisement of an entire class of citizens.

To illustrate exactly what these percentages mean in terms of the available jury pool, one must consider them in application. As Hispanics represent 4.20% of the public, for every one-thousand jurors called, one would anticipate forty-two Hispanics; instead, there are eight. As whites represent 91.18% of the population, there should be 911.8 for every one thousand jurors; instead, 942.3 are called for participation. Applying the same standard, 44.4 blacks would be called; 33.5 were presented. American Indians should represent 1.9% of the pool; however they represented 2.7% of the pool actually presented. Among known, identifiable ethnic groups, only Hispanic residents are so disproportionately underrepresented. The only reasonable conclusion which can be drawn from such facts, is that the methods employed are ineffective at comprising a representative cross-section of the community as it actually exists, and create instead, a pattern which undeniably results in the systematic exclusion of the Hispanic community.

This denied Rene Pion the participation of his own minority community in the jury process. This denied Pion Due Process of law and his right to a fair trial, before an impartial jury drawn from a representative cross-section of the community. The implications of such a procedure are far wider, however, because they deliver a message of disenfranchisement to a clearly defined, substantial and growing segment of the population. There is simply no way to assess how the credibility of Rene Pion or that of the agents who testified against him, might have been judged, had the jury hearing his case been drawn from a representative cross-section of the community, including

the availability of a representative percentage of the Hispanic community, for possible selection as federal jurors.

Statistics pertaining to the Hispanic community were not previously compiled before Pion's request that they be provided in the instant case. As such, no statistics are available for jury selection prior to the 1992 Jury Wheel. Contrary to Judge Torruella's opinion, Pion could not have furnished this data at the time of jury selection, as it had not yet, been compiled by the Clerk's Office. As the same or similarly deficient methods for comprising the Jury Wheel were previously employed, apparently, the problem has existed for some time. The only appropriate remedy upon a showing that such a systematic exclusion ofa minority group, has taken place, is to reverse Pion's conviction and grant him the relief requested herein.

The Circuit Courts treating these issues have issued a variety of opinions. The following represent a representative sample of Circuit Court opinions: *U.S. v. Garcia,* 991 F.2d 489 (8th Cir, Iowa 1993) (Hispanics and Blacks represent approximately 2.8% of general population.) *U.S. v. Whitley,* 491 F.2d 1248 (8th Cir. Iowa 1974). (Blacks comprised 2.33% of the total population, but only .28% of the 350 person venire.) Court held that a deviation of 2.05% is "simply too slight to establish a prima facie case of knowing or intentional exclusion." The court expressly ***rejected comparative*** deviation of 80% stating that because blacks constitute such a small percentage of the population, comparative characterization distorts reality. *U.S. v. LeVasseur,* 704 F. Supp. 1158 (D.Mass 1989). 5.77% of general population was black or Hispanic. Only 2.87% of Qualified Jury Wheel Pool was black or Hispanic. In denying the defendant's motion, the court cited its

approval of comparative analysis but stated that it was bound by the absolute disparity test propounded Hafen. Absolute disparity of 2.9% held not significant to constitutional concerns. The court refused to authorize supplementation of jury wheel but indicated its sympathy for the issues involved by indicating that it is engaging in a judicial colloquy in an attempt to revise the jury selection system. *Barber v. Ponte,* 772 F.2d 982 (First Cir. 1985). Persons between the age of 18-35 represent 41.46% of general population, but only 18.68% of jury venire. Absolute disparity of 19.56-22.78 depending on which figures are used. The court found that a colorable claim was presented, and remanded the case to determine statistical composition of defendant's venire, *Commonwealth v. Aponte,* 462 N.E. 2d 284 (1984). In *Aponte* the court sustained a challenge based upon substantial under-representation of Hispanics. At the time of *Aponte,* Massachusetts relied upon a mixture of random selection and a key man system for jury selection. The majority of the state's Hispanic population resided in the portion of the state which used the key man system. The court found that although Hispanics comprised 1.98% of the population, none of the 328 persons to whom grand jury questionnaires were mailed were Hispanic. The court found this statistic to be "strong evidence of a nonrandom selection procedure and the existence of bias against members of the Hispanic population." In dismissing the indictments, the court stated that the key man system is subject to abuse, and although unintentional, the system resulted in significant under-representation or total exclusion of a protected group.

CONCLUSION

This Court should grant this petition for certiorari and reverse the judgment of the First Circuit.

Respectfully submitted,

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United States Court of Appeals

For the First Circuit

No. 93-1193

UNITED STATES OF AMERICA,

Appellee,

v.

RENE M. PION,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, *U.S. District Judge*]

Before

Torruella, *Circuit Judge*,

Aldrich, *Senior Circuit Judge*,

and Cyr, *Circuit Judge*.

Benjamin D. Entine for appellant.

Geoffrey E. Hobart, Assistant United States Attorney, with whom *A. John Pappalardo*, United States Attorney, and *George W. Vien*, Assistant United States Attorney, were on brief for appellee.

June 1, 1994

CYR, *Circuit Judge*. After a two-week trial, Rene Pion was convicted on three cocaine-related charges and sentenced to concurrent mandatory minimum ten-year prison terms, pursuant to 21 U.S.C. § 841(b)(1)(A)(ii).[1] We address each of Pion's appellate claims.

A. Entrapment

Without challenging the jury instruction on entrapment Pion contends that the evidence compelled jury acceptance of his entrapment defense. We therefore inquire whether a rational jury could have found, beyond a reasonable doubt, either that he was predisposed to commit the particular crime charged *or* that the government did not induce him to commit it. *Jacobson v. United States*, ___ U.S. ___, ___, 112 S. Ct. 1535, 1540 (1992); *United States v. Reed*, 977 F.2d 14, 18 (1st Cir. 1992). Viewed in the light most favorable to the verdict, *United States v. Martinez*, 922 F.2d 914, 923 (1st Cir. 1991), there was ample evidence that Pion was not induced to commit any crime.

The only inducement to which he points on appeal is that the government informant, Esteban Mendoza, plied and enticed him with a "vital" supply of El Presidente beer for resale at Pion's restaurant. According to Pion, the government thus subjected him to "rigid economic coercion" to traffick in cocaine. Not only was this fanciful claim not

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[1] Count I charged conspiracy to possess cocaine, with intent to distribute, *see* 21 U.S.C. § 846; substantive counts II and III charged possession of cocaine for distributing, and distribution of cocaine, respectively, *see Id.* §§ 841(a)(1) & (b)(1)(A)(ii).

preserved below, it is squarely contradicted by his testimony at trial. Additionally, the El Presidente beer Mendoza supplied Pion totalled nine cases; none of it delivered until more than two weeks after he unhesitatingly indicated his willingness to supply Mendoza with the first one-half kilogram of cocaine. Thereafter, Pion participated in a three kilogram transaction (and agreed to arrange another three kilogram) with no inducement except the implicit "promises" of cocaine profits. Thus, the record reveals ample support for a jury finding that Pion was no "unwary innocent" but an " 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Mathews v. United States*, 485 U.S. 58, 63 (1988).

B. Coconspirator Statements

Pion claims that the district court committed reversible error by admitting into evidence coconspirator statements pertaining to two separate conspiracies: the first involving a one-half kilogram transaction on June 4, 1991; the second a three-kilogram transaction on July 3.[2] According to Pion, the only possible link between the two transactions was the red Honda automobile driven on June 4 by coconspirator "Rafael," purportedly Pion's cocaine supplier, and by coconspirator Christobalina Tejada on July 3. Since Pion does not suggest that the district

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[2] Pion's entire effort to identify the challenged co-conspirator statements is as follows: "The admission of alleged co-conspirators [sic] statements from the second conspiracy against Pion, in order to purportedly prove his involvement in the alleged first conspiracy, and vice-versa, was therefore error and was irreparably prejudicial to Pion."

court departed from the procedure required under *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977), and *United States v. Ciampaglia*, 628 F.2d 632, 638 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980), we review the conspiracy finding for clear error, *United States v. McCarthy*, 961 F.2d 972, 977 (1st Cir. 1992). We find none.

The government quite correctly suggests that the red Honda, registered to Tejada, was the "most obvious piece of circumstantial evidence" linking the two transactions to the same conspiracy. Equally conspicuous, however, yet overlooked by Pion, were the three participants common to both transactions, notably himself, "Rafael" and Tejada, and their tacit agreement to traffick in cocaine. Nothing more was required.

C. The Transcripts

Without identifying the translations at issue, Pion challenges, as ambiguous and inaccurate, government transcripts containing English translations of Spanish conversations recorded by Mendoza, the government informant, during various meetings with Pion and other conspirators. Since Pion did not argue before the district court that the transcripts were *ambiguous*, we review only for plain error. *See United States v. Mejia-Lozano*, 829 F.2d 268, 272 (1st Cir. 1987); Fed. R. Crim. P. 52(b).

Even though Pion's failure to identify the challenged statements severely hinders review, especially since the transcripts are not included in the appellate record, *see* Fed. R. App. P. 10(b), 11(a), we can say with confidence that there was no error, plain or otherwise. The thrust of this contention is that the transcripts are susceptible to

two radically different interpretations: one innocent (the recorded conversations merely concerned beer); the other criminal (cocaine trafficking). The record precludes any suggestion of error based on this newly minted theory, as the evidence (including Pion's testimony) and the recorded conversations themselves established beyond doubt that beer was simply the means Mendoza used to gain access to Pion.

The district court correctly followed the transcript-admission procedure set out in *United States v. Rengifo*, 789 F.2d 975 (1st Cir. 1986), by first attempting, without success, to obtain a stipulated transcript. *See id.* at 983. After Pion objected to alleged inaccuracies in the authenticated government transcript, he *consented* to its admission subject to the right to introduce his own transcript. The court thereupon admitted the government transcript and gave a cautionary jury instruction. Notwithstanding the fact that the court recognized his right to do so, Pion did not offer his own transcript. Later, Pion objected when the government attempted to read portions of its transcript to the jury. The court treated the objection as a motion to strike, and denied it.

There was no abuse of discretion. *United States v. Font-Ramirez*, 944 F.2d 42, 48 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 954 (1992) (no "abuse of discretion" where defendant neither offered transcript nor indicated specific inaccuracies in government transcript); *accord United States v. Devous*, 764 F.2d 1349, 1355 (10th Cir. 1985).

D. Juror Misconduct

The district court's decision to conduct an *in camera* inquiry to resolve a report of improper juror contact was well within its broad discretion. *See United States v. Reis*, 788 F.2d 54, 59 (1st Cir. 1986). The transcript of the *in camera* interview plainly reveals that the matters discussed directly pertained to whether the juror had been approached and whether he could be impartial.

E. Jury Composition

Pion claims a deprivation of his constitutional right, under the Sixth Amendment to the United States Constitution, to be tried by a petit jury drawn from a representative cross section of the community.[3] *See Taylor v.*

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[3] We do not share the view embraced by our brother, relating to 28 U.S.C. § 1867. *See infra* at pp. 16-19. First, it is unnecessary to address section 1867, because the merits dispute properly raised, briefed and argued by the parties, and carefully considered by the district court, presents an insurmountable barrier for appellant. *See, e.g., Norton v. Mathews*, 427 U.S. 524, 532 (1976); *In re Unanue Casal*, 998 F.2d 28, 33 (1st Cir. 1993). Second, the jurisdictional question our brother poses is anything but easy, having been squarely addressed in its present aspect by but one court of appeals, *see United States v. De Alba-Conrado*, 481 F.2d 1266 (5th Cir. 1973), which concluded – contrary to the position taken in the concurring opinion – that *constitutional* challenges to jury composition are *not* barred by 28 U.S.C. § 1867(e). *Id.* at 1270, n.4. Although we take no position on the jurisdictional question, the difficulty with the position espoused by our brother is succinctly stated in the legislative history of 28 U.S.C. § 1867(e):

> Subsection (e) makes clear that the procedures prescribed in this section are the exclusive means *for challenging compliance with the statute.* The *bill,* as

Louisiana, 419 U.S. 522, 527 (1975). The district court accepted, *arguendo*, Pion's statistical data indicating that though the 1990 census reflects that 4.2% of the residents within the Eastern Division of the District of Massachusetts are Hispanic, only 0.99% of all persons responding to the juror questionnaire during 1992, and 0.80% of those appearing for juror orientation, were Hispanic. These data form the evidentiary base for Pion's sweeping claim that "Hispanic minority members are so grossly underrepresented among federal juries as to constitute a 'systematic exclusion of the group in the jury selection process' " (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). The district court rejected the Pion claim on the fundamental ground that the Amended Jury Plan for the District of Massachusetts ["Jury Plan"] is as broadly inclusive as any in the nation and has been expressly approved under the Federal Courts Administration Act of 1992, codified at 28 U.S.C. § 1863(b)(2) (1992).[4] On appeal,

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> amended by the committee, however, *makes clear that the act will not preclude any person or the United States from asserting rights created by other statutes or for* [sic] *enforcing constitutional rights.*

H.R. Rep. No. 1076, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News 1792, 1806 (emphasis added). *See also De-Alba-Conrado*, 481 F.2d at 1270 n.5.

Given the express language employed in subsection 1867(e), and its explicit legislative history, *id.*, we believe it prudent to bypass the question, *see Norton*, 427 U.S. at 532, rather than attempt, *sua sponte*, to resolve it on the present record.

[4] Rather than voter lists or motor vehicle registration lists, the baseline data utilized under the Jury Plan are the alphabetical lists of all persons age seventeen and above residing in every Massachusetts city and town, compiled annually pursuant to

Pion nonetheless insists that the Jury Plan *results in* such substantial Hispanic underrepresentation as to render it constitutionally infirm under the "systematic exclusion" standard employed in *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

The burden is on the defendant to establish a prima facie case of unconstitutional disproportionality. *United States v. Benmuhar*, 658 F.2d 14, 19 (1st Cir. 1981). We conclude that Pion has not demonstrated that any Hispanic underrepresentation on his jury venire was due to their *"systematic exclusion in the jury selection process." Id.* at 366 (emphasis added). Consequently, he has failed to establish a prima facie violation of the "fair-cross-section requirement." *Id.* at 364; *United States v. Hafen*, 726 F.2d 21, 23 (1st Cir.), *cert. denied*, 466 U.S. 962 (1984).

The government agrees that Hispanics constitute a distinctive ethnic group in the Eastern Division of the District of Massachusetts, thus conceding the first prong of the three-part *Duren* test. *See Duren*, 439 U.S. at 364. The government counters, however, that Pion failed to make the two other *Duren* showings: that Hispanic representation on jury venires "is not fair and reasonable in relation to the number of such persons in the community" and that any such underrepresentation is "due to systematic exclusion of [Hispanics] in the jury-selection

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Mass. Gen. L. ch. 234A, § 10 (1992). *See* United States District Court, District of Massachusetts, Amended Jury Plan at 3 (Sept. 6, 1989). Names are drawn at random from these resident lists for inclusion in the Master Jury Wheel from which potential grand and petit jurors' names are then randomly drawn.

process." *Id.* Although both showings are problematic, we need address only the "systematic exclusion" claim.

Pion presented uncontroverted evidence indicating a 3.4% "absolute disparity" between the 4.2% Hispanic representation in the relevant general population and the 0.80% Hispanic representation among persons appearing for juror orientation. *See Hafen*, 726 F.2d at 24 ("absolute disparity" standard more appropriate than "comparative disparity" standard where allegedly underrepresented group constitutes very small proportion of the total population) (citing *United States v. Whitley*, 491 F.2d 1248, 1249 (8th Cir.), *cert. denied*, 416 U.S. 990 (1974)).[5] For the reasons stated in Hafen,

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[5] The "*comparative* disparity" standard would measure the percentage spread between the total number of Hispanics in the relevant general population who are eligible for jury service ["eligible Hispanics"], *i.e.*, assumedly 4.2%, and the *shortfall* between the eligible Hispanic jurors (4.2%) and the percentage appearing for juror orientation (0.8%), *i.e.*, 3.4%. The "*comparative* disparity" would be calculated by dividing the *shortfall* in Hispanic representation (3.4%) by the percentage of eligible Hispanics (4.2%), yielding a huge 81% "comparative disparity." *See Hafen*, 726 F.2d at 23.

The "*absolute* disparity" standard, on the other hand, would measure the gross spread between the percentage of eligible Hispanics (4.2%) in the relevant population and the percentage of Hispanic representation on the Master Jury Wheel. Here, Pion *wrongly assumes* a 3.4% "absolute disparity." The reality is that the *spread* between the 4.2% of eligible Hispanics and the *percentage of Hispanics on the Master Jury Wheel* has not been established, nor can it be discerned, since the percentage of Hispanics on the *Master Jury Wheel* is not disclosed in the appellate record. Thus, Pion impermissibly assumes that the 0.80% Hispanic representation among all persons who appear for juror orientation is the appropriate downside percentage for measuring the absolute disparity in Hispanic representation.

726 F.2d. at 24, the "comparative disparity" standard should not be employed in circumstances where "a small variation in the figures used to calculate comparative disparity can produce a significant difference in the result, and . . . there is reason to doubt the accuracy of the figures on which appellant would have us rely."[6]

Pion has not demonstrated that any alleged Hispanic underrepresentation on Eastern Division jury venires in the District of Massachusetts is due to "systematic exclusion in the jury-selection process." *Duren*, 439 U.S. at 366. He identifies neither a systemic defect nor an operational deficiency in the Jury Plan which would account for the alleged underrepresentation, *compare id.* at 366-67, and he expressly disavows any suggestion that the Jury Plan was either designed or intended to exclude Hispanics.

The first infirmity in the unfair cross-section claim is that the district court found, and Pion does not dispute, that the broadest data available – resident lists – are used to make up the Master Jury Wheel from which Eastern Division jury venires are drawn. There is no allegation, much less a showing, statistical or otherwise, that data more conducive to a fair cross section are available, let alone more fairly representative of eligible Hispanics in the relevant general population. Second, since the names included in the Master Jury Wheel are randomly drawn from the most inclusive data available, and random selection also determines to whom juror questionnaires are mailed, there can be no reasonable inference that the jury-

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[6] For a fuller exposition of the rationale for utilizing the "absolute disparity" standard in a case of this sort, see *Hafen*, 726 F.2d at 23-24.

selection process itself systematically excludes Hispanics at any stage up to and including the distribution of juror questionnaires.

At that stage in the process, however, the data relied on by Pion indicate, *see* 1992 July Wheel Report, Eastern Division, Boston, Mass., that only .99% of those who complete and return the jury questionnaire, and .80% of those who appear for juror orientation, are Hispanic. Nevertheless, even assuming their accuracy, these data demonstrate *no Hispanic underrepresentation on the 1992 Master Jury Wheel.* And since only those persons whose names are randomly drawn for the Master Jury Wheel can receive a juror questionnaire (and, later, a summons to juror orientation), Pion's allegation of "systematic exclusion" based on the .80% Hispanic representation at juror orientation (or the .99% responding to the questionnaire) is *pure speculation. See United States v. Garcia,* 991 F.2. 489, 492 (8th Cir. 1993) (numerical underrepresentation not a proxy for systematic exclusion); *cf. Barber v. Ponte,* 772 F.2d 982, 997 (1st Cir. 1985) (en banc) ("courts have tended to allow a fair degree of leeway in designating jurors so long as the state or community does not actively prevent people from serving or actively discriminate, and so long as the system is reasonably open to all") (emphasis in original); *cert. denied,* 475 U.S. 1050 (1986); *Benmuhar,* 658 F.2d at 19 (finding "systematic exclusion" of Hispanics as a result of Commonwealth of Puerto Rico's exclusion of non-Anglophones from jury service). With no datum as to Hispanic representation on the Master Jury Wheel, and given the fact that the baseline data

for comprising the Master Jury Wheel is the best available, there can be no reasonable inference that the relatively small Hispanic underrepresentation at juror orientation is attributable to anything other than the randomness of the draw from either the resident lists or the Master Jury Wheel. Consequently, Pion generated no trial worthy issue on the essential element of "systematic exclusion," *Duren*, 439 U.S. at 366.[7]

F. Mandatory Minimum Sentence (21 U.S.C. § 841(b)(1)(A)(ii))

Pion contends that the sentencing court improperly included an unconsummated three-kilogram cocaine transaction in calculating the amount for which he was responsible, thereby triggering the minimum ten-year sentence mandated by 21 U.S.C. § 841(b)(1)(A)(ii) (ten-year minimum for distribution of five or more kilograms of cocaine).[8] At sentencing, the government argued that Pion was responsible, under U.S.S.G. § 2D1.1 comment.

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[7] *Duren* provides an instructive contrast. There a very large (39%) *absolute disparity* existed between the percentage of women in the relevant population and their representation on jury venires, a disparity which the Court found reasonably attributable to a prominent feature in Missouri's jury-selection process; that is, the longstanding *practice* of granting women *automatic exemption from jury service upon request*. *Duren*, 439 U.S. at 366-67. Pion points to nothing in the Jury Plan, or its implementation, which would account for the much smaller (3.4%) absolute disparity alleged here.

[8] The presentence report recommended that Pion be held responsible for 3.5024 kilograms, the combined total delivered on June 4 (approximately one-half kilogram) and July 3 (three kilograms).

(n.12) (1992) [hereinafter: "note 12"], for the additional three kilograms he negotiated to supply Mendoza in July.[9] The court determined, pursuant to note 12, that Pion was not "reasonably capable of producing" the three additional kilograms.[10] Then it supportably found that the object of the conspiracy was to distribute in excess of six kilograms of cocaine, including the additional three kilograms Pion agreed to supply Mendoza later in July.[11]

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[9] Note 12 states in relevant part:

> The weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce *and* was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce *and* was not reasonably capable of producing.

(Emphasis added.)

[10] The district court ruled:

> I am *unable to find* by a fair preponderance of the evidence *that Mr. Pion was reasonably capable of producing the negotiated amount*. I've already found that he intended to produce it. But on this record, and by this record I include the presentence report and all the representations made to me, I can not find that he was reasonably capable of producing the negotiated amount.

(Emphasis added.)

[11] The court found –

> by a fair preponderance of the evidence [that Pion] knowingly, intelligently and voluntarily entered into a course of conduct the negotiation for which was and which contemplated the delivery of an additional three kilograms, or 3,000 grams of cocaine within the following week. . . .

Accordingly, the court concluded that Pion was subject to the ten-year minimum sentence mandated by statute for conspiring to possess and distribute five or more kilograms of cocaine. *See* 21 U.S.C. §§ 841(b)(1)(A)(ii), 846. Relying on the finding that he was not capable of producing the three additional kilograms negotiated on July 3, *see supra* note 10, Pion argues that the ten year minimum sentence mandated under 21 U.S.C. § 841(b)(1)(A)(ii) does not apply. We disagree.

Pion's position is confounded by the fact that note 12 is phrased in the conjunctive. *See supra* note 9. It requires the sentencing court to include the "weight under negotiation in an uncompleted distribution" unless it finds that "the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount." *Id.* (emphasis added). Furthermore, note 12 directs the sentencing court – once again in the conjunctive – to "exclude from the guideline calculation the negotiated amount that it finds the defendant did not intend to produce *and* was not reasonably capable of producing." *Id.* (emphasis added). Its conjunctive phrasing clearly is intended to avoid inflated sentences based on drug-quantity discussions in uncompleted transactions where the defendants were merely puffing; that is, where the defendants did not intend, *and* were unable, to produce the amount under discussion. *Cf. United States v. Moreno*, 947 F.2d 7, 9 (1st Cir. 1991) (applying former U.S.S.G. § 2D1.4 comment. (n.1)). In sum, Pion's claim fails because neither conjunctive clause in note 12 can be ignored.[12]

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[12] Although the parties assume that the drug-quantity determination arrived at under note 12 does not govern for purposes of triggering a minimum sentence mandated by stat-

Although the district court did not find Pion reasonably capable of producing the additional three kilograms, it found that he was a member of a conspiracy whose object was to distribute more than six kilograms and that he specifically intended to further the conspiratorial objective. *See United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984) (no "impossibility" defense available under §§ 841(a)(i) and 846); *United States v. Everett*, 700 F.2d 900, 904 (3d Cir. 1982) (Congress intended to eliminate "impossibility" defense under § 846); *see generally* Wayne R. LaFave & Austin Scott, Jr., 2 *Substantive Criminal Law* § 6.5(b), at 90-93 (1986) (discussing limits of "impossibility" defense in conspiracy cases).

The district court correctly concluded that Pion's inability to produce the additional three kilograms was no impediment to its imposition of the ten-year minimum sentence mandated by statute.[13]

Affirmed.

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ute ["MMS"], *see e.g.*, 21 U.S.C. § 841(b)(1)(A)(ii), note 12 is not limited in this fashion. Nor is there a statutory directive that might be thought to govern the threshold drug-quantity determination for MMS purposes. Absent a statutory alternative, therefore, we think application note 12 provides the *threshold* drug-quantity calculus upon which depends the statutory minimum sentence fixed under 21 U.S.C. § 841(b)(1)(A)(ii). *See United States v. Hughes*, 970 F.2d 227, 236 n.9 (7th Cir. 1992) (discussing U.S.S.G. § 2D1.4, a forerunner to U.S.S.G. § 2D1.1 comment. (n.12) (1992)).

[13] Since there has been no showing of error, Pion's cumulative error claim collapses.

– Concurring Opinion Follows –

TORRUELLA, *Circuit Judge* (Concurring). Although I agree with my colleagues on all parts of this well-crafted opinion, with the exception of Part E thereof – and even as to that, I conclude that appellant has failed to raise a cognizable claim before this court – I must express myself separately with respect to the substance of the majority's reasoning in reaching our common result.

First of all, the court has reached issues and made pronouncements thereon, which are not properly before us. I am referring to appellant's allegation that the jury pool from which the petit jury was drawn does not represent a cross-section of the community, thus violating the Sixth Amendment of the Constitution. *See, Duren v. Missouri*, 439 U.S. 357 (1979).

This contention was raised by appellant, *after* conviction, as part of a supplemental motion for a new trial. It therefore clearly fails to comply with the provisions of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861-1876, pursuant to which:

> In criminal cases, [challenges to the composition of the jury must be raised] before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds [for such a challenge] . . .

28 U.S.C. § 1867(a). This statute further establishes that:

> The procedures prescribed by this section *shall* be the *exclusive* means by which a person accused of a federal crime, . . . may challenge any jury on the ground that such jury was not

> selected in conformity with the provisions of this title.

28 U.S.C. § 1877(e) (emphasis added).

The government's apparent lapse in not challenging appellant's failure to comply with these mandatory requirements, and the district court's complacency therewith, are irrelevant to determining whether the issue is properly before us. The jury challenge requirements are to be strictly construed and failure to comply precisely with their terms forecloses any challenge to the composition of the jury. *United States v. Cooper*, 733 F.2d 1360 (10th Cir. 1984), *cert. denied*, 467 U.S. 1255 (1984); *United States v. Green*, 742 F.2d 609 (11th Cir. 1984); *United States v. Raineri*, 670 F.2d 707 (7th Cir. 1982), *cert. denied*, 459 U.S. 1035 (1982); *United States v. Bearden*, 659 F.2d 590 (11th Cir. 1981), *cert. denied*, 456 U.S. 936 (1981); *United States v. Young*, 570 F.2d 152 (6th Cir. 1978); *United States v. D'Alora*, 585 F.2d 16 (1st Cir. 1978); *Government of Virgin Islands v. Navarro*, 513 F.2d 11 (3d Cir. 1975), *cert. denied*, 422 U.S. 1045 (1975); *United States v. Fernández*, 497 F.2d 730 (9th Cir. 1974), *cert. denied*, 420 U.S. 990 (1974). Any objection to jury composition which is not timely raised is considered waived for all purposes. *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981), *cert. denied*, 454 U.S. 857 (1981); *United States v. Young, supra*; *United States v. Grismore*, 546 F.2d 844 (10th Cir. 1976).

The record shows that appellant failed to raise the jury composition issue in a timely fashion,[1] and thus, as a

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[1] There is no allegation that appellant was impeded from doing so for any valid reason, or that the information upon which his claim is based was unavailable.

matter of law, he is foreclosed from the right to contend this matter on appeal. We therefore need go no further. Yet we do, and I am thus required to express my disagreement with the majority's unnecessary dicta regarding the merits of this issue.

As is well known, to establish a prima facie violation of the cross-section requirement, a petitioner must show: (1) that the group alleged to be excluded is a "cognizable" or "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation in petitioner's venire is due to the systematic exclusion of the group in the jury-selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979); *Hernández v. Texas*, 347 U.S. 475, 579 (1954).

There should be little doubt regarding the cognizability of Hispanics for Sixth Amendment purposes. *See Hernández v. Texas*, 347 U.S. at 475; *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1986). Where I part company with my colleagues is in our relative application of the second and third *Duren* prongs.

In my view, in contrast with the majority, the figures presented by appellant show a statistically significant underrepresentation of Hispanics within the jury venire. According to the 1990 census, 4.2% of the residents within the Eastern Division of the District of Massachusetts, the relevant community, are Hispanics. Yet Hispanics represent only .80% of the venires for that Division. Otherwise stated, although the population composition is such that one would expect 42 Hispanics to

serve on the district court's jury for every one-thousand citizens called to such duty, in fact only eight Hispanics serve in the venires for every one-thousand citizens called. Appellant further contends that when compared with other identifiable ethnic groups, such as non-minority whites, blacks or American Indians, only Hispanics are disproportionately underrepresented – and the statistics were produced to support this contention.

According to my calculations, if one takes the above figures as correct, Hispanics are underrepresented in the venire by 80.95% as compared to their numbers in the community.[2] *Duren v. Missouri, supra,* at 364. Such a disparity is not only statistically significant but also constitutionally cognizable. *Id.* My method of determining disparity is dubbed the "comparative disparity" standard by my colleagues, *ante* at 8 n.5, which they understand should not be used "where [the] allegedly underrepresented group constitutes [a] very small proportion of the total population." *Id.* Citing *United States v. Hafen,* 726 F.2d 21, 23-24 (1st Cir. 1984), they promote the so-called "absolute disparity" standard, *ante* at 9 nn.5-6, whereby they conclude that the underrepresentation is only 3.4%,[3] a spread which is said to be constitutionally insignificant. *Hafen* tells us that this system of calculating disparity should be used where the cognizable group is small

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[2] This percentage of underrepresentation is measured by calculating the *shortfall* between the percentage of eligible Hispanic jurors (4.2%) and the percentage appearing for juror orientation (0.8%), i.e., 3.4%, and then dividing the *shortfall* in Hispanic representation (3.4%) by the percentage of eligible Hispanics (4.2%).

[3] 4.2% - .8% = 3.4%.

because if the "comparative disparity" method is used under those circumstances, it will distort "reality." *Hafen*, 726 F.2d at 24.

I believe this to be an erroneous conclusion for several reasons. First of all, I find *Hafen* to run contrary to prior, valid circuit precedent in *La Roche v. Perrin*, 718 F.2d 500 (1st Cir. 1983), which established the so-called comparative disparity calculation as the circuit standard for determining underrepresentation. *See also Barber v. Ponte*, 772 F.2d 982, 989 n.n.11, 12 (1st Cir. 1985). *Hafen's* attempt to distinguish *La Roche* is unconvincing. Secondly, the majority's approach leaves us without any guide or standard as to when the cognizable group is to be considered too small or large so as to trigger the switch from one standard to the other. It would appear that applying different constitutional standards to varied groups, depending on whether they are large or small, would not only raise substantial equal protection issues, but would defeat the important goals promoted by the Jury Selection and Service Act and the Sixth Amendment. The minorities most in need of protection are those least entitled to it, to allegedly prevent a "distortion of reality." I might ask who's "reality" are we talking about? To my view, the true distortion of "reality" is the failure of a criminal law system, before which is tried a large number of persons from an ethnic group, to include within its mechanisms the peers of those charged, at least in some reasonable measured proportion to their membership in the population. Finally, on its face the so-called "absolute disparity" standard appears to run contrary to *Duren*, which speaks to "the representation of [the] group in the community . . . in relation [i.e., in comparison] to the number of

such persons in the community." *Duren, supra,* at 364. This language seems to speak in *comparative,* not in absolute, terms.

We thus come to the issue of systematic exclusion. Normally, systematic exclusion requires a showing of substantial disparity in numbers over a sustained period of time, *Barker v. Ponte,* 772 F.2d 982, 989 (1st Cir. 1985), something which has not been established by appellant in this case. I believe, however, that where the disparity established by the claimant reaches the proportion of those in the present case, *80.95%,* the burden must be shifted to require the government to justify that such an aberration is not the product of inappropriate conduct. In most cases, such as perhaps the present one, this should be a burden easily explainable by the government.

Had appellant complied with the absolute requirements of 28 U.S.C. § 1867, I would have voted for reversal of his conviction. Having failed to do so, however, I concur in the affirmance of his conviction, although as indicated above, I believe that at least part of the majority's reasoning is flawed.